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No. 393

# In the Supreme Court of the United States

OCTOBER TERM, 1931

JAMES DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury will be found at pages 50–57 of the record. The opinion of the Circuit Court of Appeals (R. 80–88) is reported in 50 F. (2d) 779.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1931 (R. 89), and rehearing denied July 22, 1931 (R. 90). The petition for certiorari was filed September 21, 1931, and was

granted November 2, 1931. (R. 93.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify petitioner's conviction of maintaining a common nuisance in violation of the National Prohibition Act.

2. Whether the District Court erred in its instruction to the jury on the subject of agency.

3. Whether the petitioner's acquittal on the second and third counts of the indictment rendered his conviction on the first count illegal.

## STATEMENT

Petitioner was indicted on three counts. The first count charged that on July 4, 1930, petitioner maintained a common nuisance upon certain premises by there keeping for sale five drinks of whiskey and one drink of beer; the second, that at the same time and place he unlawfully possessed the same liquor, and the third, that on June 26, 1930, he had unlawfully sold on the same premises "intoxicating liquor fit for beverage purposes, to wit, five drinks of whiskey and one drink of beer." (R. 1–2.) Following a trial the jury returned a verdict of guilty on the first count and not guilty on the second and third counts. (R. 57.) Petitioner was sentenced to imprisonment for one year and to pay

a fine of $500. (R. 58.) Upon appeal the judgment was affirmed by the Circuit Court of Appeals (R. 89), which thereafter denied a petition for rehearing (R. 90).

The Government called as witnesses at the trial Federal Prohibition Agents Osborne and Beam. Osborne testified in substance as follows: At about 7.30 o'clock p. m. on June 26, 1930, the witness, accompanied by Agent Beam and two men unknown to them, visited the premises in question, which consisted of a room fronting on Second Street in which fishing tackle, sporting goods, cigars, and soft drinks were kept for sale, and a larger room in the rear in which there were pool tables and a bar. The party entered the rear room where the witness observed the defendant standing behind the bar. As they walked into this room one of the men with the officers said, "Hello, Jim." The party thereupon ordered "three whiskeys and one beer," which were served to them by the defendant. The witness had no doubt that the defendant was the man who served the drinks. He paid the defendant $1.00 for the four drinks. Shortly thereafter Agent Beam paid fifty cents for two more drinks, one of which was consumed by him and the other by one of the men who accompanied the officers into the place. (R. 17.)

Osborne's testimony was corroborated by that of Agent Beam, who further testified that upon being paid by Osborne for the first drinks served the de-

fendant rang up the amount on the cash register. (R. 22–24.)

On cross-examination both officers stated that in notes made by them shortly after leaving the premises they had described the defendant as having a missing tooth in his upper jaw, but that they had observed at the trial that he had no missing tooth but a space between two teeth. (R. 18–20, 24–25.)

Taking the stand in his own behalf, the defendant testified that he was the owner of the premises in question; that he was not there at 7.30 o'clock on the evening of June 26, 1930; that he had gone to his ranch at Blocksburg that day and had not returned to his place of business in Eureka until some time between 8.00 and 8.30 o'clock in the evening; that he did not see Agent Osborne and Agent Beam that night or at any other time, so far as he knew, until July 4, 1930, when he saw Agent Osborne. (R. 26.) On cross-examination he stated that he was accompanied on his trip to the ranch by a Mrs. Classen and her child; that in the front room of his place of business he had a cigar store and in the back room two pool tables, four card tables, "and soft drinks of all kinds"; that he had whiskey glasses there "to serve bitters"; that he sold soft drinks at the counter in both the front and back rooms. (R. 27–33.)

Mrs. Florence Classen, called as a witness for the defense, testified that she had been housekeeper

for the defendant since 1926; that on June 26, 1930, she and her child had accompanied the defendant to his ranch and that they had left the ranch with him about 4.00 o'clock in the afternoon and had arrived in Eureka about 8.00 o'clock. (R. 33–36.)

The defense also called Joe Dunn, who testified that he was a brother of the defendant and was employed by him at the premises in question; that on the evening of June 26, 1930, the defendant was in the place a short time; that the witness did not know the exact time the defendant was there, but would judge that it was between 7.00 and 8.00 o'clock; that the defendant did not work behind the bar at any time that evening, and that the witness was there from 6.00 o'clock until midnight of that day and did not see Agent Osborne or Agent Beam or serve them any drinks. (R. 36–37.) The witness further testified that he was in the place on the evening of July 4, 1930, at which time he was placed under arrest after an agent who read a John Doe warrant to him had asked whether he had a tooth missing; that the defendant came in while the agents were there and said, "I guess I am the man you are looking for"; whereupon the agents said that they would have to hold both until they were identified, and that Agent Osborne later appeared and identified the defendant as the man to be arrested. (R. 37–38.)

## SUMMARY OF ARGUMENT

That the common nuisance was shown to have been maintained by petitioner on June 26, 1930, rather than July 4, 1930, as alleged in the indictment, was an immaterial variance, and the evidence was sufficient to sustain the verdict.

There was no error in the instructions to the jury with reference to the criminal responsibility of a principal for the acts of his agents. The petitioner had offered evidence that he was not present when the liquor was sold. It was, however, stipulated, and the petitioner testified, that he was the proprietor of the premises which were furnished as a bar room, and the jury may well have found that the sales were made, not by the petitioner but by some one else in his behalf or with his permission. In so far as the nuisance count is concerned, the instructions were limited so as to require knowledge on the part of the defendant that some one was selling liquor on his premises. As this was the only count upon which the defendant was convicted, there was no prejudicial error in the charge.

The conviction on the nuisance count was not inconsistent with the acquittal on the possession and sale counts. The circumstances were amply sufficient to sustain a finding of guilt predicated upon the theory that the defendant, being the proprietor of the place, must have had knowledge of the sale of liquor made in the regular course of the business being there conducted. To support conviction on

the nuisance count the jury was not required to find that the person who actually made the sale was in fact the agent of the defendant. If the jury was satisfied that petitioner had knowledge that such sales were being made upon the premises of which he was the proprietor, that was enough. The court so charged and no exception was taken. (R. 57.) Accordingly the jury was quite consistent in concluding that the evidence was not sufficient to establish the identity of this person beyond a reasonable doubt, but that taking all of the circumstances into consideration there was no doubt that the defendant had knowledge of the use to which his property was being put and was therefore guilty of maintaining the nuisance.

But if the verdicts of not guilty on the sale and possession counts should be considered logically irreconcilable with the verdict of guilty on the nuisance count, the verdict of guilty must stand. The general principle is recognized by this Court in *Dealy* v. *United States,* 152 U. S. 539, and *Selvester* v. *United States,* 170 U. S. 262, 267, that each count of an indictment is in effect a separate charge, and a verdict of guilty or not guilty as to it is not responsive to the charge in any other count of the indictment. Upon this principle there is no basis for the doctrine of inconsistency asserted in this case. Furthermore, by the great weight of authority in this country and in England the doctrine is untenable. The power of the jury to bring in a ver-

dict in the teeth of both law and facts (*Horning* v. *District of Columbia,* 254 U. S. 135, 138) emphasizes the importance of disregarding logical inconsistencies as between verdicts of guilty and not guilty upon different counts of an indictment.

The reasoning upon which some courts have held that the acquittal upon one count of an indictment may require the setting aside of a verdict of guilty upon another count of the same indictment, viz., that where the evidence upon which a conviction upon one count is had would as fully support a conviction upon counts upon which there is an acquittal the conviction must be set aside because the act of the jury in acquitting shows that it must have rejected the evidence upon which the conviction was had, is unsound. Under our system the grounds upon which a jury reaches its verdict can not be ascertained, and the assumption that the acquittal shows a rejection of evidence by the jury can only be conjectural. The acquittal may well have resulted from an arbitrary refusal to convict because of leniency or other like motive.

We therefore contend that there is no sound principle of law which requires a conviction on one count to be set aside solely because the jury has failed to convict on another count upon which it could, on the same evidence, have found the defendant guilty.

## ARGUMENT

### I

### THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION OF MAINTAINING A COMMON NUISANCE

The petitioner first contends that if the evidence showed that he was maintaining a common nuisance on the premises in question it showed the maintenance of such nuisance on June 26, 1930, and not on July 4, 1930, the date charged in the indictment, and that the District Court erred, therefore, in denying motions for a directed verdict on this ground. (R. 25–26, 47–48.) But this variance between proof and allegation was quite immaterial. *Ledbetter* v. *United States,* 170 U. S. 606, 612.

The petitioner next asserts that the evidence was insufficient to establish the offense of maintaining a common nuisance because it disclosed only a single sale of liquor. The circumstances under which the four drinks of liquor were purchased by Agent Osborne and two more drinks were purchased by Agent Beam furnish persuasive evidence that the premises were maintained for the sale of liquor over the bar, in the regular course of business. This was shown by the fittings of the place, the presence of a man behind the bar serving whisky in glasses of the kind in which whisky is usually served, the fact that the liquor was at hand, ready to be served to anyone who came to the bar and ordered it, the retail charge of twenty-five cents

a drink, and the deposit of the money in the cash register, obviously operated in the conduct of the business being carried on. (R. 17, 22, 24.) This evidence, we think, was ample to justify the jury in concluding that the sale was but an instance of a practice which was being regularly carried on in this room, of which the defendant was the proprietor. That a single sale of liquor may be made under such circumstances as to warrant a conviction of maintaining a common nuisance is settled in the lower Federal courts. *Fisher* v. *United States*, 32 F. (2d) 602, 604 (C. C. A. 4th), and cases there cited. The petitioner refers to no decision in conflict.

## II

### THE INSTRUCTION ON THE SUBJECT OF AGENCY IS NOT OPEN TO THE OBJECTIONS ASSERTED BY PETITIONER

In the course of its charge to the jury the District Court gave the following instruction (R. 54):

> The familiar rule of the civil law that a person is held to be responsible for the act of an agent employed by him when the act is done in the course of the agency and in furtherance of it is equally applicable in the criminal law. When an indictment charges a defendant with crime it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant and committed in the course

> of the agency and in furtherance of it. It matters not whether his agent was an innocent agent or a guilty agent, a conscious or an unconscious instrumentality of the crime; the agent's principal would be criminally liable in either case.

Petitioner attacks this instruction on two grounds, the first being that there was no evidence that any agent of the petitioner sold liquor on the premises and the charge tended therefore to confuse the jurors as to the issues to be decided by them.

It is true that the Government's witnesses testified that the sales of liquor were made by the petitioner himself rather than by an agent. But the evidence introduced by the defense to show that the petitioner was not present when the sales were made might well have led the jury to conclude that, although the Government agents truthfully testified that sales of liquor were made on the premises, they were mistaken in their identification of the bartender. As the circumstances under which the sales were made were such as to justify the jury in finding that, if not made by the petitioner, they were made by one employed by him to make sales of that character, an instruction by the court regarding the petitioner's responsibility in that event was clearly justified.

Petitioner's second ground of attack upon the instruction is that it constituted an incorrect statement of the law in that it failed to charge that the principal must have knowledge of the act of the

agent in order to be held accountable therefor. If this contention means that the principal in order to be liable criminally for the acts of an agent must have specific knowledge of each particular act, we submit that such an interpretation of the law is too narrow. Indeed, the quotation from *Dandrea* v. *United States*, 7 F. (2d) 861, 862 (C. C. A. 8th), which petitioner gives on page 18 of his brief, specifically states that criminal liability attaches to the principal where sales are made "on his behalf and as part of his business, and under such circumstances that he must be held to know that such sales were being made." The instruction to which petitioner objects not only charges that the act must have been committed "in the course of the agency and in furtherance of it" (R. 54), which obviously means that the act must have been done pursuant to authority conferred by the principal, but it was followed immediately by a paragraph of the charge which referred to Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550) as follows (R. 55):

> I instruct you, Gentlemen, that it is the law that "Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal." Aid means to help, support, assist, one who helps or promotes in doing something. Abet means to instigate or encourage by aid or countenance; to contribute as an assistant or instigator in the commission of an offense.

> *The owner of an establishment or business who has knowledge that an employee is maintaining a liquor nuisance therein is an aider and abettor and may be convicted as a principal.* (Italics ours.)

In addition, the trial court, in ruling upon petitioner's exception to the instruction, specifically stated (R. 56–57):

> As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he knows some one was selling liquor there he would be responsible for the act of that agent, whoever that would be.

Thus, in so far as the nuisance count is concerned, the instructions were limited so as to require a finding that defendant knew that sales of liquor were being made on the premises of which he was the proprietor. As this was the only count upon which the petitioner was convicted the jury could not have been under any misapprehension as to the elements of the crime of which he was found guilty.

## III

### THE JURY'S VERDICT OF GUILTY ON THE FIRST COUNT IS NOT AFFECTED BY ITS VERDICTS OF NOT GUILTY ON THE OTHER TWO COUNTS

The petitioner's contention that because he was found not guilty of unlawful possession and sale of the liquor his conviction of maintaining a nuisance

must be set aside is, we contend, without merit, because, as we shall attempt to show, the verdicts were not inconsistent, and because such inconsistency as is claimed by the petitioner would be no ground for setting aside his conviction either upon principle or upon authority.

The petitioner interposed the defense that he was not present, as the Government witnesses testified, when the sales of liquor were made upon the premises of which he was concededly the proprietor. It may well be that the jury concluded that the Government witnesses were mistaken in their identification of the defendant as the man behind the bar, from whom they purchased the liquor. Under these circumstances and pursuant to the instruction of the court, it became necessary, in order to convict the petitioner of unlawful sale and possession, to find that the sale was made by the petitioner's agent. The jury was entirely justified in accepting the testimony of the Government's witnesses that the sales were made, although they believed them mistaken as to the identification of the person behind the bar. This, however, must have left the identity of the person who sold the liquor unknown, and the jury may well have hesitated to find, without any acceptable identification of this person, that he was the agent of the petitioner. But with reference to the nuisance count the issue was quite different. The very last words of the court to the jury,

accepted by petitioner's counsel as a correct statement of the law, were these:

> The COURT. As to whether or not the defendant here was maintaining a nuisance, I take it that it is the law that if he owns these premises and he knows someone is selling liquor there he would be responsible for the act of that agent, whoever that would be.
>
> Mr. RUSSELL [Petitioner's counsel]. We would concede that, but the evidence, and the only evidence is that the sale, if any, was made by Mr. Dunn. There is not any question of agency.
>
> The COURT. I understand your contention. The jury may now retire. (R. 56–57.)

The circumstances disclosed by the evidence were amply sufficient to sustain a finding of guilt on the nuisance count, predicated upon findings that the defendant, being the proprietor of the place, must have had knowledge of the sale of liquor, made in the regular course of the business being conducted there in his behalf. To support conviction on the nuisance count the jury was not required to identify the person who made the sale as an agent of the petitioner, except in the sense, as charged by the court in its closing words to the jury, that the petitioner, being the owner and proprietor of the place, knew that some person was engaged in selling liquor there. Accordingly, we submit, the jury was quite consistent in concluding that the evidence was not

sufficient to establish the identity of the person behind the bar, but that taking all of the circumstances into consideration there was no reasonable doubt that the petitioner had knowledge of the use to which his property was being put, and was therefore guilty of maintaining a nuisance, as charged in the indictment.

In the court below it was concluded that there was no legal inconsistency between the acquittal on charges of sale and possession and the conviction upon the charge of nuisance. This conclusion was reached upon a careful consideration of the evidence and the issues raised for the consideration of the jury, differing with respect to the charge of nuisance and the charges of unlawful possession and sale. The conclusion of the court below was, we submit, correct; but in any event it will hardly be disputed that this conclusion expressed a rational view of the evidence which was clearly open to the jury in considering its verdict upon the several counts of the indictment. In concluding the point, the court below said:

> The fact that the appellant interposed an alibi and thus raised a clear distinction as to the evidence to support the charges in the three counts of the indictment, together with his admitted ownership of the place in which it was charged that the common nuisance was maintained and the inferences with relation thereto resulting from the readiness with which intoxicating liquor was produced and sold in such place upon the request of four

strangers, sufficiently differentiated the evidence as to the separate counts as to require an affirmance even under the rule most favorable to defendants as to inconsistent verdicts. (R. 86.)

But if it should be concluded that upon any rational view of the evidence the verdicts of not guilty on the sale and possession counts must be considered logically irreconcilable with the verdict of guilty on the nuisance count, still, we submit, the verdict of guilty must stand. The general principle recognized by this Court in *Dealy* v. *United States,* 152 U. S. 539, and *Selvester* v. *United States,* 170 U. S. 262, 267, is that each count of an indictment is in effect a separate charge, and a verdict of guilty or not guilty as to it is not responsive to the charge in any other count of the indictment. Here, the indictment, in its separate counts, charged separate and distinct offenses. *Albrecht* v. *United States,* 273 U. S. 1, 11. Upon this principle there can be no basis for the doctrine of inconsistency asserted in this case, and by the great weight of authority, in this country and in England, this doctrine is untenable.

The doctrine has been repudiated by the Circuit Courts of Appeal in the Second, Sixth, and Seventh Circuits, which have held that even if the verdicts on several counts of an indictment appear to be illogical or inconsistent, a conviction on any particular count must nevertheless be sustained, because it is not for the court to attempt to follow the

reasoning of the jury, which may have influenced the rendition of its verdict. See *Marshallo* v. *United States,* 298 Fed. 74, 76 (C. C. A. 2d); *Steckler* v. *United States,* 7 F. (2d) 59, 60 (C. C. A. 2d); *Seiden* v. *United States,* 16 F. (2d) 197, 198 (C. C. A. 2d); *Gozner* v. *United States,* 9 F. (2d) 603 (C. C. A. 6th); *Carrignan* v. *United States,* 290 Fed. 189 (C. C. A. 7th).

The weight of authority generally is in accord with this view.[1]

In conflict with the decisions of the Circuit Courts of Appeal in the Second, Sixth, and Seventh Circuits are certain decisions of the Circuit Courts of Appeal in the Third and Eighth Circuits. See *Hohenadel Brewing Co.* v. *United States,* 295 Fed. 489, 490 (C. C. A. 3d); *Speiller* v. *United States,* 31 F. (2d) 682 (C. C. A. 3d); *Peru* v. *United States,* 4 F. (2d) 881, 884 (C. C. A. 8th); *Murphy* v. *United States,* 18 F. (2d) 509, 511–512 (C. C. A. 8th); *Boyle* v. *United States,* 22 F. (2d) 547, 548–549 (C. C. A. 8th).

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[1] For cases illustrative of the rule see: *Thompson* v. *State,* 177 **Ark.** 1; *People* v. *Edwards,* 72 **Cal.** App. 102; *Holt* v. *People,* 1 Pac. (2d) 921 (Sup. Ct. **Colo.**); *Hathcock* v. *State,* 88 **Ga.** 91; *People* v. *Weaver,* 173 **Ill.** App. 455; *Sichick* v. *State,* 89 **Ind.** App. 132, cf. *Rokvic* v. *State,* 194 Ind. 450; *State* v. *Brown,* 114 **Kan.** 699; *Holmes* v. *State,* 146 **Md.** 420; *Commonwealth* v. *Walsh,* 255 **Mass.** 317, cf. *Commonwealth* v. *Donovan,* 170 Mass. 228 and *Commonwealth* v. *Haskins,* 128 Mass. 60; *State* v. *Ridge,* 275 S. W. 59 (**Mo.** Ct. App.); *State* v. *Daly,* 77 **Mont.** 387; *Weinecke* v. *State,* 34 **Neb.** 14; *People* v. *Haupt,* 247 **N. Y.** 369; *State* v. *Brown,* 198 **N. C.** 41; *Browning* v. *State,* 120 **Ohio** St. 62; *Latham* v. *Queen,* 5 **B. & S.** 635 (**Eng.**)

We submit that the decisions in the Second, Sixth, and Seventh Circuits declare the true rule, and that this rule is supported in principle by the decisions of this Court in *Dealy* v. *United States, supra,* and *Selvester* v. *United States, supra.* The reasoning of the Circuit Courts of Appeal for the Third and Eighth Circuits in adopting the contrary rule is, we contend, unsound. Under our system there is no way of ascertaining the grounds upon which a jury has reached its verdict. The fact that the jury has found the defendant not guilty on one count and guilty upon another, upon evidence which in the judgment of the court would as fully support conviction on each, affords no justification for the assumption that the jury has rejected evidence necessary to support its finding of guilt. How the jury arrives at such a verdict is sheer speculation. In acquitting the defendant it may have disregarded the facts or misunderstood or misapplied the law. It may have considered the evidence sufficient to show guilt of one offense and insufficient to show guilt of the other. It may have acquitted the defendant "in the teeth of both law and facts" (*Horning* v. *United States,* 254 U. S. 135, 138), influenced by motives of sympathy or its own theories of justice. Whatever its motives or reasons may have been in acquitting the defendant, they are not ascertainable, and it should be sufficient that under correct guidance from the court they have unanimously concluded, upon ample evidence, and after a fair trial, that the defendant is

in fact guilty of an offense with which he is charged. Assuming no error in the course of the trial, the only certain test as to the validity of the jury's verdict is the sufficiency of evidence to support the finding of facts which constitute the offense.

## CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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